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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

CHILDREN'S LEGAL FOUNDATION, INC. AND AMERICAN FAMILY ASSOCIATION, INC.,

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, et al.,
RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS CHILDREN'S LEGAL FOUNDATION AND AMERICAN FAMILY ASSOCIATION

James P. Mueller
(Counsel of Record)
Children's Legal Foundation
2845 Camelback Road
Suite 740
Phoenix, Arizona 85016
602-381-1322

Peggy M. Hodges
American Family Association
107 Parkgate Drive
Post Office Drawer 2440
Tupelo, Mississippi 38803
601-844-5036
Counsel for Petitioners

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The following points reply to the respondents' brief in opposition of the Petition for Writ of Certiorari.

I. The Prohibition on the Broadcast of Indecent Speech is Not An Unconstitutional Restriction on Speech

Respondents have attempted to portray the

consequences of the implementation of a 24-hour prohibition of indecent broadcast under 18 U.S.C. §1464, as the elimination of all sexually explicit material on broadcast television and radio. The respondents liken this restriction to the state statute reviewed by this Court in Butler v Michigan, 352 U.S. 380 (1957), and other decisions which have reviewed attempts to prohibit the dissemination of indecent material on cable television.

The error in this analysis is that in Butler, the Court was reviewing a state statute that restricted the dissemination of all material that would be obscene as to minors within the state. It included magazines, recordings, books, visual material and any other form of sexually explicit material. Unlike Butler, this 18 U.S. C. §1464 applies only to broadcast television and radio. All other means of dissemination of sexually explicit material are left unrestricted under this statute. Additionally, this regulation only restricts "language or material that depicts or describes, in terms patently offensive . . . sexual or excretory activities or organs," not all sexually explicit material.

The respondents and the District of Columbia Circuit have ignored this Court's decision in Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978), and instead relied, self-servingly, on a previous decision by the D.C. Circuit that it stated compelled the "rejection . . . of a total ban on the broadcast of indecent material." Action for Children's Television v Federal Communications Commission, 932 F.2d 1504, 1508 (D.C.Cir. 1991). While the use of a prior decision by the D.C. Circuit was expedient, it was a misstatement of the law, a misapplication of the prior case, and misplaced reliance on correct precedent by the court.

The need for review in this case is specifically based upon the D.C. Circuit's willful avoidance of this Court's decision in Pacifica and the subsequent decisions that have reinforced this Court's position on the uniqueness of the broadcast industry. The attempts by the D.C. Circuit, as urged by the respondents, to apply decisions in which the regulation or statute under review applied to media other than broadcast television and radio only further serves to illustrate this uniqueness.

The courts that have addressed the attempted regulation of indecent cable programming have specifically noted the legal and practical differences between the ability to regulate broadcast programming and cable programming. In Wilkinson v Jones 480 U.S. 926 (1987) (mem.) aff'g 800 F.2d 989 (10th Cir. 1986) (per curiam) aff'g sub nom. Community Television of Utah, Inc. v Wilkinson, 611 F.Supp. 1099 (D.Utah 1985). The court identified the practical differences between cable television and broadcast television and the necessarily resultant regulatory scheme.[1]

1/ "The distinction that the FCC and plaintiffs urge is that cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed. See Pacifica at 748-49, 98 S.Ct. at 3039-40. Because a subscriber must initiate the service, there is not uninvited intrusion into the privacy interest that the Court articulated in Pacifica. * * *." 611 F.Supp. at 1113-14.

The Wilkinson court further stated:

> Thus, the distinctions between Pacifica and the present case are manifest. Pacifica does not authorize the regulation attempted by the Utah Legislature. At best Pacifica stands for the proposition that a federal regulatory agency can monitor consumer complaints directed at broadcasters who operate in the public domain. The differences between radio and cable make Pacifica easily distinguishable and contradicts defendants' argument.

Id. at 1115.

II. Contrary to Respondents Assertion Pacifica Recognized and Relied Upon a Legitimate Governmental Interest in Protecting Adults from Unwelcomed Intrusion

Respondents maintain that the only governmental interest upon which the restriction of broadcast indecency may be legitimately based is the need to protect children. While this basis is certainly an interest sufficient to sustain this regulation, it is not the only legitimate governmental interest involved. In fact, this Court in Pacifica, specifically recognized an interest ahead of the interest the government had in protecting children. The Court stated:

> Patently offensive,indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. * * *. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.

438 U.S. at 748.

The interests involved in protecting the privacy of the home is equally, if not more so, applicable to adults rather than children. The Pacifica Court clearly recognized the legitimacy of the government's interest in protecting the privacy of the individual's home. The recognition of the privacy interest is particularly significant in light of the fact that the initial complainant in Pacifica heard the offending broadcasting while riding in an automobile—outside the confines of his home. If this Court recognized the legitimacy

of the privacy interest as it relates to the broadcast of indecent material in the context of adults riding in an automobile, then the underlying rationale is even more significant to the privacy of the home. The FCC's failure to rely upon and state this important governmental interest in its earlier position on the issue is of no importance, and certainly does not change the reasoning set forth in Pacifica.

The position of the respondents and the D.C. Circuit is and has been that parents are responsible for the supervision of their children and that the 24-hour prohibition on the broadcast of indecent material is overbroad. There was ample evidence before the Commission to support the finding that children are in the broadcast audience, in significant numbers, without supervision at all times of the day. The respondents cite a survey by National Research, Inc., that found "between the hours of 10 p.m. and 6 a.m., . . ., 99% of all persons aged 17 and younger are under adult supervision; more than 93% are under parental supervision." Brief for Action for Children's Television, et al., at 18, Children's Legal Foundation, Inc. et al v Action for Children's Television et al No. 91-833 (Jan. 1992). The research upon which the respondents rely and the Commission did not, was commissioned by Action for Children's Television and identified only the times when an adult or a parent "had the opportunity to supervise the child" not actually supervise the child. Comments of Action for Children's Television, In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, MM Docket No. 89-494 (August 1990).

As the facts of the Pacifica case illustrate, the broadcast of indecent material makes effective parental supervision almost, if not virtually, impossible. The individuals involved in Pacifica were a man and his child.

The father was as attentive to the needs of his child as reasonably possible and yet they were both caught unaware and assaulted by the indecent broadcast. The D.C. Circuit has re-written the concept of parental supervision for its own end. Parental supervision has never meant merely the opportunity for a parent to supervise his child, but the actual ability on the part of the parent to supervise the activities. In the case of broadcast indecency, both the opportunity and the actual ability are absent.

III. The Judgment of the District of Columbia Circuit Court is a Final Judgment

Respondents assert that the judgment by the D.C. Circuit lacks finality. The respondents state that "review . . . would be best considered in the context of a fully-developed Commission record." It is difficult to conceive of a more thorough investigation and analysis on the part of a federal agency than that undertaken and produced by the Federal Communications Commission in this matter. The Commission, during the pendency of this matter in the D.C. Circuit issued its Notice of Inquiry into the matter of broadcast indecency. The Commission received in response to the Notice "over 92,500 formal and informal responses." Report of the Commission In the Matter of Enforcement Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, at 2, n.6. The Commission received thirty-two separate formal initial and reply comments from individuals and organizations.[2]

2/ Several organizations filed comments jointly. In total, approximately 94 separate organizations or individuals formally participated in the commenting process.

All parties concerned in this matter have been completely and fully heard on this matter. The Commission, after careful consideration, issued its Report as required by the D.C. Circuit. Contrary to the Commission's Report and the underlying evidentiary matter, the D.C. Circuit found the regulations to be unconstitutional. A further hearing to determine the proper hours of a safe harbor period is unnecessary, since such a period is not constitutionally mandated.

IV. Conclusion

The judgment of the District of Columbia Circuit Court should be reversed and should be remanded for adjudication consistent with this Court's decision in Pacifica.

Respectfully submitted,

James P. Mueller
(Counsel of Record)
Children's Legal Foundation
2845 Camelback Road
Suite 740
Phoenix, Arizona 85016
602-381-1322

Peggy M. Hodges
American Family Association
107 Parkgate Drive
Post Office Drawer 2440
Tupelo, Mississippi 38803
601-844-5036